Supreme Court of the United States

OCTOBER TERM, 1944

Estate of Robert Marshall, James Marshall, Executor,
Petitioner,

against

Commissioner of Internal Revenue,
Respondent.

BRIEF IN SUPPORT OF PETITION

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended. The judgment of the Circuit Court affirming that of the Tax Court was entered on February 9, 1945.

Statement of the Case

The statement of the case is contained in the petition.

Specification of Errors

1. The Circuit Court of Appeals erred in holding that the gifts in trust in the Last Will and Testament of Robert Marshall were not exclusively for charitable or educational purposes.

2. The Circuit Court of Appeals erred in holding that the right granted to the trustees to draft legislation and

to use all lawful means to support the same was a primary purpose and not incidental to the primary purposes of the trusts and, therefore, deprived the trusts of their exemption from taxation under Section 812 (d) of the Internal Revenue Code as the same read at the time of decedent's death.

3. The Circuit Court of Appeals erred in failing to consider the statutory distinction between activities by trustees and those by corporations in attempting to influence legislation.

4. The Circuit Court of Appeals erred in holding that the power granted to the trustees to transfer the trust res to a non-profit corporation, which might be organized for the same objects and purposes as the trusts, justified it in treating the gifts as though made to a corporation; and in holding that they were, therefore, not exempt from taxation under Section 812 (d) of the Internal Revenue Code.

5. The Circuit Court of Appeals erred in applying a different rule of law to that applied by the Court of Appeals of the District of Columbia, the Circuit Court of Appeals for the Third Circuit and the District Court of the District of Massachusetts.

I

The decision of the Court of Appeals is contradictory to decisions in other jurisdictions and rests on grounds that are novel, dangerous and erroneous.

The decision of the Circuit Court of Appeals, as explained in its opinion written by Circuit Judge Augustus N. Hand, is apparently based on three points. One point is in conflict with the decisions of courts in three other Federal jurisdictions, including a case in which this Court

refused a writ of certiorari; a second point sets up a thoroughly dangerous doctrine contrary to American principles; and the third point is a synthetic peg upon which the decision is desperately hung without benefit of thought or logic.

The decision is unfortunately misleading in its apparent simplicity. This simplicity arises out of the consistent avoidance of the points raised by the petitioner, including the history of the statute, the relation of its parts and the long and consistent line of court decisions on charitable trusts.

I

The Court argued that the trusts established by the will of the testator were not "exclusively for * * * charitable, scientific, * * * or educational purposes" and therefore not exempt under Section 812 (d) of the Internal Revenue Code because the trustees were empowered "in furtherance of the objects and purposes" of the trusts to draft bills and use all lawful means to secure their enactment into law. This argument confuses the question of what is a charitable or educational trust with the right of tax exemption. (See Point II.) The question is important because whereas gifts to corporations, though charitable, are not exempt where a substantial part of its activities "is carrying on propaganda, or otherwise attempting, to influence legislation", similar gifts to trustees were, at the time of the testator's death, exempt regardless of the activities of the trustees in attempting to influence legislation. (See Point IV.)

In the face of the statute the Court could not hold that the possibility of engaging in legislative activities deprived charitable or educational gifts to trustees of the statutory exemption; but it evaded this result by the argument that the possibility of legislative activity of itself transmuted otherwise exclusively charitable or educational trusts into trusts not "exclusively" charitable or educational; that is,

made the trusts taxable. This argument contradicts the history of Section 812 (d). It is in direct conflict with decisions, involving the identical or similar statutes, rendered by the Court of Appeals for the District of Columbia (*International Reform Federation* v. *District Unemployment Compensation Board,* 131 F. [2d] 337 [1942], cert. den. 317 U. S. 693 [1942]), by the Circuit Court of Appeals for the Third Circuit (*Girard Trust Company* v. *Commissioner,* 122 F. [2d] 108 [1941]), by the District Court of Massachusetts (*Old Colony Trust Co.* v. *Welch,* 25 F. Supp. 45 [1938]), and even by the Circuit Court of Appeals for the Second Circuit itself (*Slee* v. *Commissioner,* 42 F. [2d] 184 [1929]).

2

The Court below distinguished the *Girard Trust Company* case (and also the *International Reform Federation* case) on the ground that there the gift was to a corporate board of a church. This doctrine, that there is a distinction to be made between church and lay organizations, that a different rule should be applied to legacies to churches than to other charitable or educational gifts, is novel, is not to be found in the statute and is a dangerous principle to introduce in a country in which church groups have not been privileged as such.

The Court differentiated the present case in these words: "In the case at bar, the objects of the trusts were not to promote ends long accepted as socially desirable but to reform rather than merely to support existing systems" (R. 64). **There is no authority for a holding that the exemption of trusts from taxation or their charitable or educational character are to be determined by such criteria as whether their ends are "long acceptable or socially desirable" or whether they are "to reform rather than to support existing systems".**

Charity does not begin with the maintenance of the *status quo* and certainly education to be education cannot

end with the complacent task of teaching only what is "long accepted as socially desirable".

The approach to this question is ably set forth by Professor Scott in the *Law of Trusts,* Vol. 3, Sec. 374.7. Discussing charitable trusts for "unpopular causes", Professor Scott wrote as follows:

> "The charitable trust has played a notable part in promoting the interests of minority groups in the community. As we have seen, various religious sects in England have been enabled to establish themselves and to break down the monopoly of the established church. Similarly the charitable trust has played a great part in the field of education. It has been possible through privately endowed institutions to try many experiments to which it would be improper to devote the public funds, or which the public would be unwilling to support until convinced by proof of their success. And so it has been in other fields. The mere fact that the members of the court and the great majority of the people believe that a particular purpose is unwise does not prevent a trust to accomplish that purpose from being charitable, if the general purposes for which the trust is created may reasonably be thought to promote the interests of the community. * * *
>
> On the other hand, if the purpose for which a trust is created is wholly irrational, it is not a charitable trust. But it is not always easy to draw the line between purposes believed to be irrational and those believed to be merely unwise. The test is not what the court believes, and not what the majority believe, but what rational persons may believe."

The theory propounded by the Court below is novel and dangerous. It makes the charitable or educational nature of bequests conditional upon the political, social and economic preferences of each Court. This can be no better demonstrated than by the antagonistic attitude of the Court below towards the trusts in this case as evinced by the language of its opinion. There are phrases in it more polemic than judicial, such as "political agitation", "political activities" and "however desirable the politics may be thought to be by some".

This strong emotional distaste for the purposes of the testator is unquestionably the cause for such arguments by the Court, as: "But, a dominant object of the first trust was to eliminate the capitalistic system and a designated method, *and perhaps the only practicable one for achieving this result, was by securing legislation. However lawful such a means is it necessarily will involve political agitation* * * * " (R. 63). (Italics ours.) Just what the learned Court meant by "political agitation" is uncertain. Did it mean discussions through pamphlets, forums, lectures, newspaper publicity? Did it mean lobbying? Did it mean mass demonstrations—broken heads included? At any rate nothing is more certain than that legislation would prove a most impracticable way to "eliminate the capitalistic system", or as the will put it, to educate "the People of the United States of America to the necessity and desirability of * * * the promotion and advancement of an economic system in the United States based upon the theory of production for use and not for profit" (R. 18). The education must come first, the people must be convinced before the legislation could be passed or become effective. In the face of popular resistance legislation could not eliminate the purchase and sale of spirituous liquors, nor could it eliminate black markets. How could legislation be "the only practicable" way to "eliminate the capitalistic system"?

The Court further said that the same argument that it applied to the first trust—the so-called Economic Trust—would hold true as to the Civil Liberties and Wilderness Trusts. It held that the objectives of these trusts "can only be attained or effectively maintained through specific legislation" (R. 63). That obviously is an error. There *might* be legislation necessary or ancillary to the purposes of those trusts, but surely there are already constitutional Bills of Rights and thousands of civil liberties statutes which are not uniformly and consistently enforced. There is educational work to be done here. There are rights to

be protected in the courts. There are wilderness areas to be protected too. Legislation to this end has already been adopted (Forest Land Management Act, 16 U. S. C., Sec. 567a-567c; Forests Sustained Yield Act, 16 U. S. C., Sec. 583-583(i)). There is a need to develop a large body of people interested in "the preservation of wilderness conditions in outdoor America" if that purpose and the purposes of the statutes are to be achieved.

The concept of Civil Liberties does not require a reform of our existing system nor is the support of Civil Liberties anything but the strengthening of our existing body politic rather than its reform. The will itself speaks of maintaining, preserving and developing civil liberties (R. 19).

Similarly, the Court's distinction has no validity in its application to the "Wilderness Trust". By this time, as a result of the writings and actions of Theodore Roosevelt, Gifford Pinchot, Daniel Beard and others, the preservation of our natural resources is a well-recognized concept of our way of life.

The test is not whether the gifts were designed to support or to reform our existing body politic. The test is whether it was the intention of the testator to educate upon lines which to a reasonable man might appear to promote the interests of the community. That clearly was testator's intent. The will is shot through with provisions for employment by the trustees of lecturers and writers and for the publication and distribution of pamphlets, magazines or newspapers (R. 18, 19, 20).

The Circuit Court of Appeals for the Second Circuit applied an erroneous test. It incorrectly interpreted the word "exclusively" in the statute in a manner at variance with the heretofore accepted liberal approach designed to encourage gifts for charitable and educational purposes. It drew a heretofore non-existent distinction between trust purposes in support of things as they are and those in reformation of our system. This distinction finds no substance or support in the reported cases.

The argument made by Judge Hand that the exemption must be denied because "the objects of the trusts were not to promote ends long accepted as socially desirable but to reform rather than merely to support existing systems" is indeed startling in this day. Certainly the history of the progress of our country in social and economic legislation over the past twelve years, at least, lends no weight to the principle enunciated by the Court. A substantial part of our pattern of legislation which is now accepted as fundamentally necessary and proper was exceedingly unpopular some years ago and was condemned as not being of a character "to promote ends long accepted as socially desirable" but rather "to reform * * * existing systems". Witness the Wagner Act, which revolutionized the rights of labor; the Social Security Act, as now in force and as proposed to be amended; the Wage & Hour Law, etc.* Not so long ago any of the foregoing would have been considered socialistic and likely to overthrow the basic structure of "existing systems".

This Court must not permit to go unreversed such doctrines as that which distinguishes between charitable gifts to church groups and to lay groups and that which holds that the test of a charitable gift is whether its ends are "long accepted as socially desirable" or whether it seeks "to reform rather than merely to support existing systems".

3

The third point upon which the Court below based its decision was built upon that paragraph in the will which permitted the trustees to form corporations to carry out the objects and purposes of the several trusts.

---

* Wagner Labor Relations Act, 29 U. S. C., Secs. 151-166.
Wage & Hour Act, 29 U. S. C., Secs. 201-219.
Bankhead-Jones Farm Tenant Act, 7 U. S. C., Secs. 1000-1029.
Tennessee Valley Authority, 52 Stat. 154.
Fair Labor Standards Act, 29 U. S. C., Secs. 201-219.
Unemployment Compensation Act, 42 U. S. C., Sec. 501.

Article Eighth of the will provides:

> "If the Trustees of any of the trusts specified in Paragraph 'Fourth' hereof shall determine that the objects and purposes of the trust of which they are Trustees may best be effected through corporate means, they are expressly empowered to incorporate or cause to be incorporated under the General Laws of the State of New York or by special act of the legislature of the State of New York a corporation or corporations which shall have authority, among such other powers as may be conferred upon it, to take and hold the property constituting the trust fund with respect to which such corporation shall have been organized, and to administer, invest and dispose of the same and to devote the principal thereof and the income therefrom to the objects and purposes specified in said Trust * * *" (R. 22).

Upon this clause the Court predicated the conclusion that the trusts were not tax exempt, writing as follows:

> "Moreover the trustees, as we have already said, are authorized to organize corporations to hold the trust fund for the purposes specified in the trusts and *it cannot be denied* that such a corporation would not be one which would be 'organized * * * exclusively for * * * charitable, scientific, * * * or educational purposes', or a corporation 'no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation'. The power to form a corporation which would not be entitled to a deduction, if the bequests had been made to it directly, in our opinion precludes a deduction by the estate. Such a power would be a ready means for evading estate taxes" (R. 62-63). (Italics ours.)

It should be noted that it was the Court which introduced this point into the case. It was not urged by the Government in its brief or on oral argument.

The statement just quoted contains no less than three basic errors: (1) that it canot be denied that a corporation organized to receive a transfer of the trust funds would

not be organized exclusively for charitable or educational purposes; (2) that it cannot be denied that such a corporation would not be one no substantial part of the activities of which would be to influence legislation; and (3) that the power to incorporate would be a means to evade estate taxes.

Of course these dicta of the learned Court not only can be but are denied. If, as we shall hereafter demonstrate, the purposes of the trusts are charitable or educational, then the trusts are not unclassed by being transferred to and administered by a corporation organized by the trustees in order best to effect the testator's purposes. Nor do they lose their charitable or educational status if they are used in legislative activities.* If a "substantial part" of their activities were to influence legislation, then and then only under Section 812 (d) would the gifts lose tax exemption if they were made to a corporation. But the trusts even then would not lose their charitable character (Points II and III *infra*).

Moreover, as will be shown in Point VI, *infra,* the Revenue Act speaks not of some future event, but as of the date when a bequest becomes operative—that is as of the date of death.

Finally, the argument that the power in the trustees to transfer to a corporation provides a ready means of tax evasion, though prejudicial, is otherwise idle. It accepts the petitioner's contention that a gift to trustees would be exempt from taxation though the trustees had the power to influence legislation, whereas a gift to a corporation with such an object would not be. But the Court goes on to argue that the will granted the trustees power to incorporate; therefore, to prevent a possible evasion for which Congress did not provide, the Court must act as though the gift were originally to a corporation.

---

* By decree of the Surrogate's Court of New York County, wherein the administration of the estate is pending, the trusts were held to be charitable trusts under the laws of the State of New York. The Attorney General of the State of New York who exercises supervisory powers over charitable trusts was a party to the proceedings in which the decree was entered (R. 27).

As we shall further show under Point VI, *infra,* the provision in the will authorizing incorporation of the trusts added no power not already present in the trustees by law. Any trustee of a charitable trust has the power to incorporate his trust and it has never been held that such right will change the character of the gift so as to affect adversely its tax status. The learned Court below evidently missed this consideration, or it could not have talked seriously of the possibility of tax evasion.

This whole argument concerning the power of the trustees to incorporate is a tenuous concoction. Standing alone it might not justify this Court in assuming jurisdiction of this case. However, taken with the other points raised, it demonstrates an accumulation of error by the Court below. It is, too, one further example of the mind slant of the Court to tax trusts with the objectives of which it indicated it was unsympathetic.

II

The trusts are charitable and therefore exempt from taxation.

The statutory tax exemption of charitable or educational gifts is to be interpreted liberally in favor of the taxpayer. This, as has been uniformly held, is because Congress intended in enacting Section 812 (d) to favor gifts for such purposes by encouraging testators to make them. *YMCA* v. *Davis,* 264 U. S. 47 (1924); *St. Louis Union Co.* v. *Burnet,* 59 F. (2d) 922, 926 (C. C. A. 8, 1932); *Commissioner* v. *Pupin's Estate,* 107 F. (2d) 745 (C. C. A. 2, 1939).

In fact, the word "exclusively" in the statute has been thus construed, to the end that bequests are not subject to estate tax if their general or predominant purpose is religious, charitable, scientific or educational. *Trinidad*

v. *Sagrada Orden*, 263 U. S. 578 (1924); *Girard Trust Co.* v. *Commissioner*, 122 F. (2d) 108 (C. C. A. 3, 1941); *Slee* v. *Commissioner*, 42 F. (2d) 84 (C. C. A. 2, 1930); *George E. Turnure*, 9 B. T. A. 871.

The words "charitable" and "educational" have also been liberally construed. Definitions of the meaning of the word "educational" in the taxing statute under consideration may be found in *Weyl* v. *Commissioner*, 48 F. (2d) 811, 812 (C. C. A. 2, 1931); *Jones* v. *Better Business Bureau*, 123 F. (2d) 767, 769 (C. C. A. 10, 1941), and *U. S.* v. *Proprietors of Social Law Library*, 102 F. (2d) 481 (C. C. A. 1, 1939).

In *U. S.* v. *Proprietors of Social Law Library*, *supra*, the Court held that a gift to a social law library which restricted its use to a certain type of subscriber was, nevertheless, educational and entitled to the benefit of tax-exempt statutes.

The Court is respectfully referred to certain specific instances where trusts have been held to be educational or charitable and which are, in a broad sense, analogous to the trusts set up in the last will and testament of Robert Marshall. For example, trusts to promote temperance and to educate people respecting the evils of intoxicating liquor have been consistently held charitable or educational gifts. *In re Moore's Estate*, 66 Misc. 116 (Surrogate's Court, Saratoga County, 1910); *Harrington* v. *Pier*, 105 Wis. 485, 82 N. W. 345, 347; *American Issue Publication Company* v. *Evatt*, 137 Ohio St. 264; see also, *Girard Trust Company* v. *Commissioner*, 122 F. (2d) 108, 109 (C. C. A. 3, 1941).

A trust for the advocacy of Women's Suffrage was held to be an educational trust in *Garrison* v. *Little*, 75 Ill. App. 402, 411.

Gifts to the Anti-Vivisection Society were sustained in *Pennsylvania Co.* v. *Helvering*, 66 F. (2d) 284, 285 (C. A., D. C., 1933); *Old Colony Trust Co.* v. *Welch*, 25 F. Supp. 45, 48 (D. C. Mass., 1938), and *In re Kendall's Estate*, 133 Misc. 568, aff'd 227 App. Div. 778 (1st Dept., 1929).

A trust to educate the community respecting the use of initiative and referendum and to sponsor legislation with respect thereto was sustained as an educational trust in *Taylor* v. *Hoag*, 273 Penn. 194. The same result was reached with respect to a trust to educate concerning the subject of socialism. *Peth* v. *Spear*, 63 Wash. 291. The purposes of these trusts are analogous to the purpose set forth in the first trust under Mr. Marshall's will. Each envisions the education of the people of the United States upon public questions. *Collier* v. *Lindley*, 203 Cal. 641 (1928).

The cases are collected and discussed at length in *International Reform Federation* v. *District Unemployment Compensation Board*, 131 F. (2d) 337, 339-341 (C. A., D. C., 1942), cert. den. 317 U. S. 693 (1942). That case will be hereafter discussed with particular reference to the wording of the statute and the requirement that the trusts be "exclusively" for the purposes enumerated in the statute (*infra*, pp. 18-20).

As has already been pointed out, the economic trust established by decedent, while necessarily unpopular in certain circles, represents a trend which has been recognized in the social and labor legislation adopted in the last twelve years.

By analogy to the Wilderness Trust, it was held in *More Game Birds in America* v. *Boettger*, 125 N. J. L. 97, 99 (1940), that a corporation organized for the purpose of "conserving game birds in America" and to "establish hatcheries, refuges and to teach vermin control" was a charitable organization. In *Noice* v. *Schnell*, 137 Atl. 582 (N. J., 1927), a trust "to maintain and develop * * * the Palisades along the Hudson, in the Borough of Englewood Cliffs and vicinity", was held a valid charitable trust.

The maintenance of a cabin as an historic landmark is a charitable purpose. *Steenis* v. *City of Appleton*, 230 Wis. 530 (1939). There are other cases which similarly hold that gifts for the purpose of maintenance of historic shrines or monuments are tax exempt under statutes which accord benefits to charitable or educational gifts.

If the maintenance of such historic shrines falls within the exemption of such statutes, it is submitted that there is even more reason to apply the tax benefits of the statutes to the Civil Liberties Trust, which is designed to maintain and sustain for all of us those fundamental principles guaranteed by the Federal and State Constitutions. Professor Scott, in Section 370.3, Volume 3 of his Treatise on *The Law of Trusts*, points out that a trust for the training for citizenship is charitable in nature.

Each of the trusts created in the testator's will was thus clearly educational in its objects and purposes. The denial of tax-exempt status to such trusts is largely based in the opinion below upon the contention that the power granted to the trustees "to draft bills and acts, laws and other legislation, and use all lawful means to have the same enacted into the laws of the various States of the United States of America and by the Congress of the United States of America" (R. 18, 19, 20) deprives the trusts of their otherwise educational or charitable nature.

III

Trusts are no less charitable or educational because they may incidentally carry on propaganda or otherwise attempt to influence legislation.

Where the right or power to advocate legislation is ancillary or subordinate to the main purposes of the gift, it has uniformly been held that the gift is tax exempt. *Slee* v. *Commissioner of Internal Revenue*, 42 F. (2d) 184 (C. C. A. 2, 1929); *Leubuscher* v. *Commissioner of Internal Revenue*, 54 F. (2d) 998 (C. C. A. 2, 1932); *Girard Trust Co.* v. *Commissioner of Internal Revenue*, 122 F. (2d) 108 (C. C. A. 3, 1941); *International Reform Federation* v. *District Unemployment Compensation Board*, 131 F. (2d) 337 (C. A., D. C., 1942), cert. den. 317 U. S. 693 (1942); *Old Colony Trust Co.* v. *Welch*, 25 Fed. Supp. 45 (D. C. Mass., 1938).

In *Girard Trust Company* v. *Commissioner of Internal Revenue*, 122 F. (2d) 108 (C. C. A. 3, 1941), the Board of Tax Appeals had disallowed a deduction from an estate tax of a bequest by a testatrix to the Board of Temperance, Prohibition and Public Morals of the Methodist Episcopal Church. The applicable Revenue Act was the Act of 1926, which authorized deduction of

> "the amount of all bequests * * * to * * * any corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes * * *."

With regard to the legislative activities of the beneficiary of this gift, Judge Goodrich, for the majority, wrote as follows:

> "The difficult part of this case comes with regard to that part of the activity of the Board of Temperance which has to do with the attempt to influence legislation. A bright line between that which brings conviction to one person and its influence on the body politic cannot be drawn. Mr. Justice Holmes forcefully puts it: 'If you * * * want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition' * * *.
>
> Nor has the law sought to draw such a bright line between the exercise of private and public influence. Judge Hand has pointed out that the promoters of a charity are not unclassed when the charity seeks a special charter or when a society to prevent cruelty to children seeks positive support of law to accomplish its ends or when a university seeks legislation to provide its appropriations. Surely a church would not lose its exemption as a religious institution if, pending a proposal to repeal Sunday observance laws, the congregation held a meeting on church property and authorized a committee to appear before a legislative body to protest against the repeal. The majority of the charitable trust cases recognize the validity of a gift to prohibit or minimize manufacture and sale of intoxicating liquor. They are not directly controlling, of course. But they furnish a strong analogy. The activities of the Board fell within the type which have

> been regarded as religious by the Methodist Church for a century and a half. **A limitation, if any, upon the deduction granted in general terms of bequests to religious bodies is for Congress to make and Congress has since made it in the 1934 statute. Such limitation not having been imposed by legislation, it is not for a court or administrative officer to impose it"** (pp. 110-111). (Emphasis ours.)

In this decision, then, the Circuit Court of Appeals for the Third Circuit has taken the position that, unless Congress speaks to the contrary, the activity of an otherwise charitable organization in the field of legislation does not deprive that organization of the benefit of its tax-exempt status under the Internal Revenue Act.

The Circuit Court has vainly attempted to distinguish this case from the *Girard Trust Co.* case upon the ground that "the bequest there was to a corporate board of the Methodist Episcopal Church and there was no question that the trust fund would be deductible except for the activity of the legatee in attempting to influence legislation" (R. 62). This is a distinction without meaning. By analogy, the trusts created by testator would undoubtedly have been deductible except for the authority granted to draft bills and acts, laws and other legislation and to use lawful means to have the same enacted into law. Clearly, if the *activity* of the legatee in the *Girard Trust Co.* case did not deprive it of its tax-exempt status, then the mere authorization contained in testator's trusts to draft and support legislation should not deprive these trusts of their tax-exempt status.

Reference to the record in the *Girard Trust Co.* case discloses that the Board of Temperance, Prohibition and Public Morals of the Methodist Episcopal Church, to which the gift was made, was incorporated separate and apart from the church under Chapter 18 of the Code of Laws for the District of Columbia. At the time of the gift the Board

was acting and operating under a "Constitution" providing as follows:

> "Section 2. Article 1. The object of this Board is to promote voluntary total abstinence from all intoxicants and narcotics, to promote observance and enforcement of all existing constitutional provisions and statutory enactments that suppress the liquor traffic and the traffic in narcotic drugs, *to promote the speedy enactment of such legislation throughout the world, and to defend and maintain established civil and religious liberties.*" (Italics ours.)

The language of the "Constitution" of the Board of Temperance, Prohibition and Public Morals of the Methodist Episcopal Church specifically states that its object and purpose was to *promote* legislation. In contrast to that statement of such purposes is the language of decedent's will, which defines his purposes as "the education of the people of the United States to the necessity and desirability of the development and organizations of unions * * * " (R. 18), "the safeguarding and advancement of the cause of civil liberties * * * to the end that the civil liberties * * * be forever maintained, preserved and developed" (R. 19) and "the preservation of the wilderness conditions in out-door America * * * " (R. 20).

Thus we have on the one hand the distinct object and purpose of legislative promotion on the part of the beneficiary in the *Girard Trust Co.* case as contrasted with the avowed purpose of education of the people in the instant case.

Since any distinction between the facts in this case and the holding of the Circuit Court of Appeals for the Third Circuit would be a distinction favorable to the contention of the petitioner, we again repeat that the Court in this case purported to draw a distinction merely to justify a conclusion based upon its preconceived ideology. This is substantiated by the very sentence in the opinion which

follows the purported distinction. Judge Augustus N. Hand wrote:

> "In the case at bar the objects of the trusts were not to promote ends long accepted as socially desirable but to reform rather than merely to support existing systems" (R. 62-63).

The error of that statement has been clearly demonstrated in Point I of this brief and is most effectively rebutted by Professor Scott in that portion of his treatise on the *Law of Trusts* cited at page 5 of this brief.

The holding of the Circuit Court of Appeals for the Third Circuit was followed by the Court of Appeals for the District of Columbia in *International Reform Federation* v. *District Unemployment Compensation Board,* 131 F. (2d) 337 (1942), cert. den. 317 U. S. 693 (1942).

The question involved in that case was whether the International Reform Federation was exempt from the payment of the unemployment insurance tax under Section 1 (b) (7) of the District of Columbia Unemployment Compensation Act, which excepted

> "services performed in the employ of a corporation * * * organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes * * * no part of the net earnings of which inures to the benefit of any private shareholder or individual."

Note that the exception from taxation under that Act is identical with the exception under consideration in this case. The International Reform Federation had existed for nearly a half a century and, during that period of time, had written thirty-six bills on moral subjects for submission to various State legislatures and eighteen that had passed Congress. Its primary purpose was to promote those various reforms upon which the churches could agree, such as limitation of liquor traffic, white slave traffic, sale of drugs, sabbath laws and suppression of gambling.

The Unemployment Compensation Board took the position that, even were the Federation classified as a corporation organized for charitable, religious, or educational purposes, it was not *exclusively* organized for such purpose. The Court, in an opinion of Chief Justice Groner, rejected that contention, sustained the Federation and reversed the judgment of the Board of Tax Appeals. The Court first found that the Federation was a religious, charitable, or educational organization.

It then rejected the contention that the activity of the Federation in supporting legislation deprived it of its exemption as a charitable organization and wrote:

> "In the view taken in the cases to which we have referred, it cannot be questioned that the general purposes as well as the activities of appellant, as we have outlined them above, may be said to be well within this rule. Unless, then, that portion of appellant's activities in relation to Federal and State legislation on subjects of moral or social interest unclass it as a charitable organization, the decision below must be reversed. **The Board insists that appellant's activities are political and, being political, may not at the same time be charitable or educational in the sense in which those words are used in the Act.** Undoubtedly some cases may be found sustaining the view that organizations seeking changes of law are engaged in political activity and therefore neither charitable nor educational, whatever the motive. The ground for such holdings is that the court has no means of judging whether a proposed change in the law will or will not be for the public benefit. But this reasoning is not convincing, and we prefer the more modern view that so long as the purpose can be thought by some to be in the public interest, the court is not concerned with its wisdom. See Vol. 2, Bogert, Trusts and Trustees, Sec. 378, at p. 1204.
>
> Certainly no one will question that an educational campaign to arouse public sentiment against the commercial use of women in immorality, against the use of narcotic drugs, against gambling, and against political corruption, is in the public weal. Certainly most people believe that the habit of temperance in the use of intoxicating liquor is beneficial. And certainly many

believe that the absolute prohibition of the use of liquor will be helpful to mankind. In the 50 years of its existence, appellant has pursued just these objectives, along with others which it believes to be for the public good and in the interest of public morals.

To this end it disseminates writings and sermons and expends its funds in educating the public mind to the nature and character of the evils it seeks to eradicate, and in doing so keeps in touch with, and on occasion prepares, bills, and appears before legislative committees, State and Federal, when these subjects are under consideration. **It would seem to us to be going very far to say that these legislative activities accomplish a metamorphosis in appellant's character whereby it is changed from a charitable or educational to a political organization. Such activities have never been classified as lobbying in the sense in which that activity has been either prohibited or licensed. Hence we see no actual difference between the education of the individual—admittedly proper—and the education of the legislator, where both are directed to a common end, and that end, not the advancement, by political intrigue or otherwise, of the fortunes of a political party, but merely the accomplishment of national social improvement.** There is nothing new in this position, and it has found support in many cases" (p. 340). (Emphasis ours.)

"In the case now under consideration, as we have seen, the statute in precise terms excepts from its provisions service performed in the employ of a corporation operated exclusively for religious, charitable or educational purposes. Nothing is to be found in this paragraph which pronounces the corporation or the fund less charitable or less religious or less educational because it seeks to accomplish its purpose as well in the corridors of Congress as in the churches and homes of the people. Nor can such a distinction be implied with any degree of reason" (p. 341).

To similar effect is the case of *Old Colony Trust Co.* v. *Welch*, 25 F. Supp. 45 (D. C. Mass., 1938). The decedent in that case had made a gift of a portion of his residuary estate to the New England Anti-Vivisection Society, a Massa-

chusetts corporation organized to oppose scientific research by vivisection. The charter of the corporation stated that it was organized for the purpose, among others, of "urging education and legislation in pursuance of these ends". Between 1917 and 1933 the society had sponsored three bills in Massachusetts asking that dogs be exempt from the practice of vivisection and the society had conducted during all that period a broad educational campaign against that type of scientific research.

District Judge Ford held that this society was created for the improvement of mankind and that, therefore, this was a charitable gift. He found, furthermore, that the mere support of legislation was not sufficient to deprive the gift of its tax-exempt privilege, writing at page 49:

> "The circumstances of the society favoring the passage of the legislation described above did not in any way place the society outside the provisions of the Act. This legislation was merely incidental to carrying out the purposes and accomplishing the purposes of the society. The help of the Legislature was necessary to enable it to advance its aims. This activity was as expressed in the case of Slee v. Commissioner of Internal Revenue, 2 Cir., 42 F. 2nd 184, 185, 72 A. L. R. 400, 'mediate to the primary purpose, * * * ancillary to the end in chief.'
>
> This incidental activity does not militate against the contention that this organization was 'exclusively' organized and operated for charitable purposes.
>
> I find that the New England Anti-Vivisection Society was organized and is operated exclusively for charitable purposes within the meaning of the Revenue Act of 1926 as amended by the Revenue Act of 1932, and the amount of the bequest made to it was deductible from the value of the gross estate for Federal Estate Tax purposes. See Pennsylvania Co. for Insurance on Lives, etc. v. Helvering, 62 App. D. C. 254, 66 F. 2d 284; In re Foveaux (1895), 2 Ch. 501; Armstrong v. Reeves, Ir. L. R. 25 Eq. 325; Trinidad v. Sagrada Orden, 263 U. S. 578, 44 S. Ct. 204, 68 L. Ed. 458."

Because of the emphasis of the Circuit Court below upon the alleged purpose of the testator "to reform rather than merely to support existing systems" (R. 62-63) we are compelled to point out to this Court that the very principle for which the Anti-Vivisection Society exists is controversial and depends, in view of well-recognized scientific objection, upon legislative enactment. District Judge Ford, in his opinion, properly only made passing reference to that point, for he, as judge, was not called upon to weigh or even consider the desirability of the program. His decision, therefore, is a clear and correct statement of the principles of law applicable in this case. Judge Ford cited and followed holdings in the Second Circuit to the effect that if the right of power to advocate legislation is ancillary or subordinate to the main purpose, the gift is tax exempt. *Slee* v. *Commissioner of Internal Revenue,* 42 F. (2d) 184 (C. C. A. 2, 1929); *Leubuscher* v. *Commissioner of Internal Revenue,* 54 F. (2d) (C. C. A. 2, 1932).

In *Slee* v. *Commissioner of Internal Revenue, supra,* Judge Learned Hand made this distinction:

> "Political agitation as such is outside the statute, however innocent the aim, though it adds nothing to dub it 'propaganda', a polemical word used to decry the publicity of the other side. Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them. Nevertheless, there are many charitable, literary and scientific ventures that as an incident to their success require changes in the law. A charity may need a special charter allowing it to receive larger gifts than the general laws allow. It would be strained to say that for this reason it became less exclusively charitable, though much might have to be done to convince legislators. A society to prevent cruelty to children, or animals, needs the positive support of law to accomplish its ends. It must have power to coerce parents and owners, and it does not lose its character when it seeks to strengthen its arm. A state university is constantly trying to get appropriations from the Legislature; for all that, it

> seems to us still an exclusively educational institution. No less so if, for instance, in Tennessee it tries to get leave to teach evolutionary biology. We should not think that a society of book lovers or scientists was less 'literary' or 'scientific', if it took part in agitation to relax the taboos upon works of dubious propriety, or to put scientific instruments upon the free lists. All such activities are mediate to the primary purpose, and would not, we should think, unclass the promoters. The agitation is ancillary to the end in chief, which remains the exclusive purpose of the association. Trinidad v. Sagrada Orden, 263 U. S. 578, 44 S. Ct. 204, 68 L. Ed. 458" (p. 185).

It seems clear, therefore, from the weight of opinion, that the mere fact that trustees are empowered to draft legislation and to effect its passage does not deprive an otherwise charitable or educational trust of its charitable or educational character. This was obviously the holding of the Surrogate's Court, New York County, concerning the trusts here involved (R. 27). The trusts in question must, therefore, be deemed to be exclusively charitable and educational. They are without the exception contained in the Internal Revenue Code and within the terms of the exemption of charitable and educational trusts.

IV

As the exception dealing with action to influence legislation did not apply to trustees, but only to corporations, at the time of testator's death, it is, therefore, irrelevant to this case.

Section 812 (d) of the Internal Revenue Code is derived from Section 303 (a) (3) of the Revenue Act of 1926 (44 Stat. 72), and, as amended June 6, 1932, Chapter 209, Section 807 (47 Stat. 282), read as follows:

> "The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or

> the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary or educational purposes, or for the prevention of cruelty to children or animals."

In 1934 that section of the Revenue Act was amended (48 Stat. 755) by adding after the word "individual" and before the words "or to a Trustee or Trustees" the words "and no substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation".

The new clause, therefore, was applicable only to corporations. Congress distinguished charitable corporations from trustees of charitable trusts, doubtless in accord with the established American attitude that corporations are sinners to be tolerated but restricted. And the Act stood in this form at the date of Mr. Marshall's death in 1939.

In formulating its regulations under Section 812 (d) of the Internal Revenue Act which applied at the time of decedent's death, the Treasury Department expressly recognized the distinction between gifts to corporations and gifts to trustees by making inapplicable to trustees the provisions with respect to influencing legislation. This subject is covered by Article 44 of former Regulation 80, which read in part as follows:

> "Deduction may be taken of the value of all property transferred by will or by the decedent in his lifetime not to exceed the value of the transferred property required to be included in the gross estate if in either case the property was transferred (1) to or for the

use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes; or (2) to or for the use of any corporation or association organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes (including the encouragement of art and the prevention of cruelty to children or animals), if no part of the net earnings of the corporation or association inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation; or (3) to a trustee or trustees, or a fraternal society, order or association operating under the lodge system, if such transfers, legacies, bequests, or devises are to be used by such trustee, trustees, fraternal society, order, or association exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals. * * * "

It will be noted that the regulations specifically provide that, in determining the deductibility of gifts to a corporation or association, the donee shall not be engaged in propaganda activities or influencing legislation, whereas such text is omitted in the provisions relating to gifts to trustees. Similarly, in Article 45 of the Regulations the Treasury Department provided that, in order to avail itself of the right to the exemption, *a corporation or association* must show that "no substantial part of its activities shall be carrying on propaganda or otherwise attempting to influence legislation". Such proof was not required as to gifts to trustees.

That it was the intention of Congress to make this distinction between gifts to corporations and gifts to trustees is even more clearly indicated by an analysis of the amendments made by Congress in 1934 and subsequent years to the Revenue Act. In 1934 and in 1935, Sections 23 (o) (2), 23 (q), 101 (6) and 1004 of the Internal Revenue Code were all amended by the insertion of the phrase *"and no*

substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation".

However, in two instances, and only in those instances, Congress failed to insert the qualifying language with respect to influence of legislation, viz., in Section 162 of the Internal Revenue Code, as to the deductibility from net income of those funds used by an estate or trust for religious, charitable, scientific, literary and educational purposes, and in that portion of Section 812 (d) which relates to gifts to trustees, as distinguished from that portion of the section which dealt with gifts to corporations.

The Court must assume that Congress had a purpose in mind when it made the various amendments above referred to and omitted all reference to propaganda and influencing legislation in two places. *United States* v. *Bashaw,* 50 Fed. 749, 753-754 (C. C. A. 8, 1892). The Court certainly cannot extend the legislative action of Congress to those instances in which it failed or refused to act. *Girard Trust Co.* v. *Commissioner, supra.* And this obtains further and conclusive support by the action taken by Congress in the amendment made by it to Section 812 (d) in 1942—after the testator's death—when, for the first time, it applied the provisions as to legislative activities to gifts to trustees.

Subsequent to the 1934 amendment of Section 812 (d) of the Internal Revenue Code, the case of *Girard Trust Company* v. *Commissioner,* 122 F. (2d) 108 (C. C. A. 3, 1941), arose. This involved a trust created by a testatrix who died in 1933. The bequest was to the Board of Temperance, Prohibition and Public Morals of the Methodist and Episcopal Church, which was a charitable corporation. That this corporation engaged in legislative activity is now history documented by the late and now repealed Eighteenth Amendment. Nevertheless, among other things, the Circuit Court of Appeals for the Third Circuit held that the amendment to the statute of 1934 did not apply to the

bequest, which was therefore exempt from taxation. Circuit Judge Goodrich said in this regard, on page 110:

> "A limitation, if any, upon the deduction granted in general terms of bequest to religious bodies is for Congress to make and Congress has since made it in the 1934 statute. Such limitation not having been imposed by legislation, it is not for a court of administrative officer to impose it."

Robert Marshall had died in November, 1939. The decision in the *Girard* case was in June, 1941. On May 28, 1942, the petitioner filed his petition with the U. S. Board of Tax Appeals, appealing the deficiency claimed by the Commissioner on March 6, 1942 (Rec. 50). Thereafter, in the Revenue Act of October 21, 1942, Chapter 619, Section 409 (a) (56 Stat. 949, 950), the section of the Internal Revenue Act above referred to was further amended by inserting at the end thereof, so as to include trustees and fraternal societies, the same clause concerning legislative activities which had been added by the Revenue Act of 1934 to cover charitable bequests to corporations.

The same reasoning therefore applies in this case as was applied in the *Girard Trust Company* case, that is, that the will having taken effect prior to the amendment of the statute, the amendment is not applicable to this case, and the provision with reference to legislative activities on the part of trustees of a charitable trust does not operate as an exception to the exemption of charitable trusts from taxation.

Although the historical background of Section 812 (d) of the Internal Revenue Code was fully briefed by petitioner, the Court below entirely ignored the same in arriving at its conclusion. In effect, therefore, the Court read the statute as if the words "no substantial part of the activities of which is carrying on propaganda, or otherwise, attempting to influence legislation" were contained in that portion of the section which applied to gifts to trustees (R. 61, where the Court makes reference to that limitation with respect to gifts to corporations).

But the point is that if the statutory provision with reference to legislative activity did not apply to trustees at all at the time these trusts became effective, then there is nothing in the statute which could lead to a conclusion that as to trustees, at any rate, a charitable trust became any less charitable because it might engage in legislative activities. Had the Court given proper consideration and weight to the statute and its historical background it would have been compelled to reach the same conclusion as did the Circuit Court of Appeals for the Third Circuit in the *Girard Trust Co.* case and the Court of Appeals for the District of Columbia in the *International Reform Federation* case.

The duty of the Court was to interpret the statute, not to attempt to write the law as it thought it should be. "Judicial legislation is prohibited" (1 Paul and Mertens, *Law of Federal Income Taxation* (1934), Sec. 3.04). "The duty of the courts is limited to interpretation; they cannot legislate. * * * The statute must be taken as it stands without judicial addition or subtraction" (1 Mertens, *Law of Federal Income Taxation* (1942), Sec. 3.03).

V

The language of the will concerning legislation was not directive and not a purpose of the trusts but merely permissive. Therefore, even were the exception to the exemption of charitable bequests applicable to bequests to trustees, it would not apply to this case.

The language of the will is instructive on this point. In setting up the three trusts, the testator granted portions of his residuary estate to trustees "for the following objects and purposes". Then in each instance the objects and purposes are set forth and at the end the trustees are given various additional powers, such as the right to pay and employ lecturers, writers and organizers and to print and

publish books, pamphlets and magazines. In addition, the trustees are given "authority to draft bills * * * and use all lawful means to have the same enacted * * * ", or are granted "the power to draft bills * * * and use all lawful means to have them enacted into the law * * * ", or "said trustees shall be empowered to use all lawful means in opposing statutes * * * and said trustees shall have the power to draft bills * * * and use all lawful means to have the same enacted * * * " (R. 18, 19, 20).

Surely no one would claim that the provisions permitting the trustees to employ lecturers and writers or to issue publications were anything but ancillary to the objects and purposes of the trusts.

Similarly, the provisions as to legislation are not among the "objects and purposes" of the trusts, but are powers granted to the trustees, powers which might well be deemed to reside in them, irrespective of any specific enunciation. Nor would anyone question that a corporation might press legislation without a specific empowering act, or that individuals might; and there is no reason to distinguish between them and trustees. Could it be held that because the power to oppose statutes was only mentioned in the provisions of one trust, the trustees of the other trusts could not oppose legislation?

As a mere grant of authority, the clauses add nothing. They are not objects and purposes of the trusts, and if the trustees fail to avail themselves of the powers with respect to legislation, the Attorney General of the State could not attack them on the ground that they had not performed the functions of their trusts.

The distinction between the objects and purposes of a trust and the incidental powers which may be granted to the trustees is indicated by a comparison of the *Slee* and the *Leubuscher* cases, *supra*. In the *Slee* case, where the bequest was held to be taxable, one of the declared objects of the corporation was (p. 184): "To enlist the support and cooperation of legal advisers, statesmen and legisla-

tors in effecting the lawful repeal and amendment of state and federal statutes which deal with the prevention of conception". Here, then, the object and purpose of the corporation was legislative action.

On the other hand, in the *Leubuscher* case, the will provided, "being firmly convinced that the principles expounded by Henry George in his immortal book entitled 'Progress and Poverty' will, *if enacted into law,* give equal opportunity to all * * * " (italics ours). The testator then authorized his executor to turn over funds to a corporation to be formed "for the purpose of more effectively carrying out the above stated objects of this trust, and shall transfer to such corporation all the moneys they may have received from my estate for said purposes". There, the words "if enacted into law" were held not to be an object and purpose of the trust and not to deprive the trust of its exclusively charitable character. The Court said at page 999 that those words "but visualize what the testator thought would happen if education went forth as to the principles of Henry George".

Therefore, even were this Court to hold that the provisions of the Internal Revenue Code with reference to legislation were applicable to trusts held by trustees, it could not properly find that one of the purposes of these trusts was to carry on propoganda or otherwise attempt to influence legislation. The testator may have hoped that his trustees would not close their eyes to the importance of legislation, but he did not impose upon them any duties or obligations with respect to legislation.

VI

The power of the trustees to transfer the res to a non-profit corporation did not deprive the trusts of their tax-exempt status.

1.

In Point IV of this brief, petitioner has fully and carefully analyzed the legislative action of Congress with respect to Section 812 (d) and similar sections of the Internal Revenue Code. Such analysis established that Congress distinguished between gifts to corporations and gifts to trustees. The Circuit Court for the Second Circuit, however, gratuitously and without foundation either in fact or in law, made the point that the power in the trustees to transfer the res to a non-profit corporation which they *might organize* precluded application of the tax exemption as such power accorded a ready means for evading estate taxes. There are no facts in the record upon which to base a conclusion of intent to evade. Surely it could not be spelled out of the language of the will.

As a matter of fact, the contention of the Court misses the point entirely. The question of tax status under Section 812 (d) of the Internal Revenue Code is not affected in the least by the fact that the trustees are individuals or corporate bodies exercising trust functions. What is determinative is the nature of the bequest.

2.

Even if the authority granted the trustees to organize a non-profit corporation to carry out the objects and purposes specified in the will were absent, the trustees could, with the consent of the Court, organize such a corporation for such objects and purposes. That this power exists has long been established by decisions of the courts.

Curtis v. *First Church*, 285 Mass. 73 (1933); *City of Boston* v. *Curley*, 276 Mass. 549 (1931); *Nelson* v. *Cushing*, 2 Cush. 519 (Mass., 1848); *Sanderson* v. *White*, 18 Pick. 328 (Mass., 1836).

The act of incorporation would not vary the powers or the duties of the trustees or change the character of the trusts placed under their management. It would enable them only to act in a corporate name, to have a corporate seal. It would afford them the facility of taking conveyances, obligations and securities in their corporate name and thus avoid the necessity of changing such securities upon a change of individual members composing the board. They would still remain trustees (*Nelson* v. *Cushing*, *supra*, at p. 527). The court in New York, having jurisdiction of the estate, would not lose its supervisory control over the trustees and, through them, over the corporation organized.

Consequently, if the power existed in the trustees as specifically held in the cases above cited,* there can be no possible point to the argument that the power to incorporate would afford a means for evading taxes.

3.

Finally, by resort to the statute itself, we find that the Court has taken the liberty of torturing the statutory language. The phrase in question, upon which the Court relies in using the corporate analogy, reads:

> "no substantial part of the activities of which *is* carrying on propaganda or otherwise attempting to influence legislation." (Italics ours.)

The Court, in this case, without reason or explanation has transformed the word "is" into "may be", "shall be" or "is empowered to".

---

* There is no record that this principle has ever been questioned. The New York Courts have held that a testamentary trust follows the res in the hands of a corporation to which it is transferred under the provisions of the Will. *Trustees of Sailors' Snug Harbor* v. *Carmody*, 158 App. Div. 738, 746 (1st Dept., 1913), aff'd 211 N. Y. 286, and cases cited therein.

The fact is that Congress used language which indicates that the actual activity of the donee at the date of death is the consideration upon which exemption is based. Congress not only used the present tense but also, wherever the limiting phrase was employed in the tax law, used the opening phrase:

> "no *substantial part* of the *activities* of which * * *" (Italics ours.)

This clearly emphasizes Congressional intent to deny tax exemption only to those organizations, otherwise considered charitable or educational, which were in fact actively engaged in propaganda or lobbying and which devoted a major portion of their activity to such purposes. Congress did not include in the limitation the *possibility* of future legislative activity or of ancillary and secondary activity of such a nature. Nor did it deny exemption when no substantial part of the trust activities dealt with legislation.

Since the determination of the right to exemption must be made as of the date of death and there was no corporation entitled to receive the bequest at that time, the limiting language with respect to legislative activities cannot apply in this case.

The Circuit Court, in its reliance upon the authority in the trustees to organize a non-profit corporation, merely created a straw man without substance either in fact or in law. The power of the trustees to organize a corporation has no bearing whatsoever upon the basic issues in this case.

Summary

There can be little question that the fundamental objects and purposes of Mr. Marshall's trusts were educational. The whole tenor of the language used bears witness to his interest in the greater knowledge and understanding on

the part of the American public of the broad and fundamental issues with which he was concerned. It is only after the public is sufficiently educated to the necessity and desirability of these objects that legislation in support of them can have any reasonable prospect of success. The basic theory of our governmental structure is that the elected representatives of the people reflect the will of the people, their constituents. Education with respect to these broad problems is, therefore, a prerequisite to the adoption of any legislation.

The trusts were, thus, clearly for educational purposes and entitled to the exemption of Section 812 (d) of the Internal Revenue Code. They were none the less educational because of the grant of power to the trustees to support legislation or because of the power of the trustees to organize a non-profit corporation with objects and purposes similar to those specified in the will. The taxing statute in force at the time of testator's death contained no limiting provision with respect to the tax-exemption of gifts to trustees for educational purposes.

The decision of the Court below, in denying tax-exemption to testator's trusts, was in direct conflict with the decisions of the Circuit Court of Appeals in the Third Circuit in *Girard Trust* v. *Commissioner, supra,* of the Court of Appeals for the District of Columbia in *International Reform Federation* v. *District Unemployment Compensation Board, supra,* and of the District Court for the District of Massachusetts in *Old Colony Trust Co.* v. *Welch, supra.* Moreover, the decision represents a departure from the basic liberal approach to be found in the decision of this Court in *Trinidad* v. *Sagrada Orden, supra.*

In effect, the Circuit Court for the Second Circuit formulated distinctions without foundation in statutory enactment or Court decision. These distinctions create a dangerous and unwise precedent, to wit, between gifts to religious organizations and gifts to secular organizations

and also between gifts, which, in the opinion of some Court, are "long accepted as socially desirable" and gifts which, in the opinion of a Court, are "to reform rather than merely to support existing societies".

CONCLUSION

For all of the foregoing reasons and particularly because of the conflict between the Circuits upon similar matter, the important question of statutory construction and tax-exemption status of educational bequests and the dangerous and novel concept enunciated by the Court below, the petition for certiorari should be allowed.

Respectfully submitted,

James Marshall,
Simon Gross,
Marvin J. Bloch,
Counsel for Petitioner.

Mark Eisner,
Ferdinand Tannenbaum,
on the Brief.